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*Attorneys for the Individuals Identified
in the Notice of Appearance
at Docket No. 8234*

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

LEHMAN BROTHERS INC.,

Debtor.

Case No. 08-01420 (SCC) SIPA

ANSWER

TRIAL BY JURY
IS DEMANDED

The 340 individuals listed in Appendix A (the "Client Group"), by their counsel, Scarola Malone & Zubatov LLP, submit this Answer in accordance with this Court's Order, dated and entered April 1, 2014 (Docket No. 8576).

1. The Client Group states that no answer to the allegations in Paragraph 1 is called for, except denies that (i) the relief the Trustee seeks may be sought by means of omnibus objections; and that (ii) the relief the Trustee seeks is warranted. To the extent Paragraph 1 purports to assert the propriety of this Court's jurisdiction over this proceeding, the Client Group states that such jurisdiction is contested per defenses as asserted herein below.

2. The Client Group denies the allegations in Paragraph 2 and states that the members of the Client Group were not, at the relevant time, LBI employees and that the

ESEP was not offered to individuals who were LBI employees or executives at the relevant time. The Client Group further states that the attachment referred to in Footnote 2 as "[a] true and correct copy of the ESEP" is not, in fact, the ESEP, as that term is defined in Paragraph 2, but is, rather, an individual employee's deferred compensation agreement, and, further, that the particular deferred compensation agreements of which the attached Exhibit A is an example were, by their terms, *agreements*, and thus, could not be unilaterally "amended" by any entity, much less by LBI, which was not a party to any such agreements.

3. The Client Group denies the allegations in Paragraph 3 and requests that this Court decline to award the relief the Trustee requests therein.

4. The Client Group admits the allegations in Paragraph 4, except states that to the extent Paragraph 4 purports to assert the propriety of this Court's jurisdiction over this proceeding, the Client Group states that such jurisdiction is contested per defenses as asserted herein below.

5. The Client Group admits the allegations in Paragraph 5, except states that to the extent Paragraph 5 purports to assert the propriety of venue in this Court for purposes of this proceeding, the Client Group states that such venue is contested per defenses as asserted herein below.

6. The Client Group admits the allegations in Paragraph 6, except denies that the individuals described were executives or employees of LBI at the relevant time.

7. The Client Group denies the allegations in Paragraph 7 and states further that the Trustee has, in two places in the quoted excerpt from Exhibit A, misleadingly substituted "[LBI]" for "Shearson," a term defined in Exhibit A and not defined to include LBI.

8. The Client Group denies the allegations in Paragraph 8 and states further that the Trustee has, in two places in the quoted excerpt from Exhibit A, misleadingly

substituted “[LBI]” for “Shearson,” a term defined in Exhibit A and not defined to include LBI.

The Client Group does not deny the allegations in Footnote 3.

9. The Client Group denies the allegations in Paragraph 9 and states further that the Trustee has, in two places in the quoted excerpt from Exhibit A, misleadingly substituted “[LBI]” for “Shearson,” a term defined in Exhibit A and not defined to include LBI.

10. The Client Group denies the allegations in Paragraph 10, except states that the Client Group is without knowledge or information sufficient to form a belief about the extent to which the substantive allegations in that paragraph may or may not be “[b]ased on analysis by the Trustee’s counsel of the Deferred Compensation Claims and other relevant documents and materials.”

11. The Client Group admits the allegations in Paragraph 11.

12. The Client Group denies the allegations in Paragraph 12 and requests that this Court decline to award the relief the Trustee requests therein.

13. The Client Group states that no answer to the allegations in Paragraph 13 is called for, except denies such allegations to the extent they would purport to assert or revive rights or defenses that have been waived or relinquished or that are otherwise inconsistent with any relevant agreements and/or applicable law.

DEFENSES

For its statement of additional defenses to the Trustee’s effort to seek subordination of the rights of the Client Group under the contract each of them signed, entitled Executive and Select Employees Deferred Compensation Agreement, a specimen copy of which is at Exhibit A to Docket No. 8576-1 (the “Contract”), the Client Group

alleges, in the alternative, the following as a preliminary statement of its members' defenses (with their affirmative defenses to follow separately):

AS AND FOR A FIRST DEFENSE

14. The Contract is an executory contract.

15. The Contract provides, among other things, continuing material duties for the Debtor, including, without limitation, the duty to pay the members of the Client Group their deferred compensation pursuant to the terms of the Contract.

16. The Contract provides, among other things, continuing material duties for the Client Group, including, without limitation:

"10. Investments by Shearson.

"In connection with this agreement, Employee hereby agrees to cooperate with Shearson, as may be necessary, to acquire in the name of Shearson any life insurance contract, annuity contract or other investment in which Shearson in its absolute discretion may choose to invest for purposes of meeting its obligations under this agreement."

17. Significantly, this Section of the Contract is entitled "Investments of Shearson" and addresses, among other things, the need for the Client Group members to cooperate in being the subject of investments Shearson might make to fund the liabilities under the Contract, including by way of insurance policies then contemplated at the time the Contract was made, separate insurance, annuities or other investments Shearson might have elected to acquire in connection with this plan or its liabilities thereunder, all of which would require the Client Group members' consent and possible submission of information or submission to examination, or additional acts necessary to assure the continued validity and viability of the vehicles then in place (for example, and by way of example only, as laws

might change governing plans of this type or the underlying corporate-owned or stranger-originated life insurance policies contemplated at the time the Contract was made).

18. The Contract contains additional material duties on the part of the members of the Client Group, including, without limitation, duties to pay or repay money to Shearson or, in some instances, to Shearson or its "successors" (see, for example, the Contract at § 9(b) (page 10) and § 9(c) (page 11); and also at § 9(e)(iii) (page 15)), and material duties to supply corrected information (at § 5(h) (pages 5-6)).

19. The Contract, being an executory contract, has been rejected in this case since the filing of the bankruptcy.

20. As a rejected executory contract, the Contract was materially breached as of the time before the filing of the bankruptcy petition in this case by the Debtor.

21. By reason of that material breach, neither the Debtor nor the Trustee nor anyone standing in either of their shoes may assert affirmatively any rights they might have had prior to such material breach.

22. By reason of the foregoing, such material breach vitiates the subordination clause upon which the Trustee relies in now seeking subordination to the extent such clause could be deemed effective notwithstanding the other defenses of the Client Group.

23. Accordingly, the Trustee's effort to have the acknowledged claims of the members of the Client Group deemed subordinated to the claims of general unsecured creditors must be denied.

AS AND FOR A SECOND DEFENSE

24. The Contract does not provide for the subordination the Trustee seeks in the event of the bankruptcy of this particular Debtor.

25. The Contract entered into by each member of the Client Group was made with Shearson Lehman Brothers Inc. ("Shearson").

26. As described further below, per the definitions and language of the Contract, the subordination provisions which the Trustee seeks to invoke in this case apply specifically and only to Shearson as that entity was understood and constituted at the time the Contract was entered into and not to this Debtor or any other entities, including any that may purport to be Shearson's successors, as the term "successors" is widely and specifically used in the Contract in other contexts *but not in this context*.

27. As described further below, the Debtor is a materially new entity and not the same as, or interchangeable with, "Shearson," as referred to and defined in the Contract and as that entity was understood and constituted at the time the Contract was made.

28. As such, as described further below, the Debtor and the Trustee are not entitled to enforce the subordination provisions of the Contract against the members of the Client Group.

*The Debtor Is Not the Entity to Which the Client Group
Agreed to Have Its Deferred Compensation Claims Subordinated*

29. At the time the Contract was made, Shearson was a subsidiary of an enormous financial conglomerate under the overall umbrella of the American Express Company.

30. It was widely understood and explicitly discussed with Shearson management leading up to the entry into the Contract by members of the Client Group that the purpose of the subordination provision in the Contract was to assist Shearson in the reckonings of its capital for purposes of meeting regulatory capital requirements (including those of the New York Stock Exchange).

31. It was also expressly discussed in the circumstances that a bankruptcy by Shearson was, under any foreseeable circumstances, out of the question, because American Express itself would stand behind any obligations of Shearson and not permit such a bankruptcy.

32. Consistent with these circumstances, as described further below, the "subordination" language was by its terms limited and written to be limited to pertain only to the virtually inconceivable bankruptcy of Shearson, as that entity was then understood and constituted; and that subordination provision appeared with the limited purposes of satisfying those capital requirements and assisting Shearson in meeting those capital requirements.

33. For these reasons, among others, the subordination provision, as drafted, was intended to and did by its plain terms apply only to Shearson itself, as that entity was then understood and constituted, and did not apply to any later-existing entity that might or would be a successor to Shearson or a successor to some of Shearson's assets or into which Shearson would change; and most certainly the subordination provision does not apply to this Debtor or the insolvency proceeding of this Debtor.

34. In the years following the making of the Contract, especially in the late 1980s through the early 1990s, the Shearson business owned by American Express was the subject of numerous additions, subtractions and meaningful changes in corporate structure, composition and form.

35. To begin, in the late 1980s, after the Contract was made, Shearson acquired and merged with another entity in a billion-dollar transaction, and changed its name to reflect the merger (until 1990, when the name change was dropped in large part due to this merger's toxicity and financial damage to the entity).

36. In connection with these transactions, the new business underwent a substantial and material corporate reorganization.

37. By way of further example, also in the early years after the making of the Contract, the entity that had been Shearson was then dismantled in material respects, and sold off in pieces.

38. By way of example of this dismantling, substantial components of the business that had been Shearson at the time the Contract was made, and some that were acquired later, including Shearson's large retail brokerage business and Shearson's large asset management business, were sold to two other entities.

39. The significant changes to what had been Shearson did not end there.

40. In the succeeding years, having dismantled Shearson, as it had existed at the time of the making of the Contract, American Express decided to jettison Shearson itself.

41. Specifically, in a series of transactions completed in 1993 and 1994, Shearson, and its immediate holding company corporate parent, were spun out of the American Express conglomerate of companies by means of a dividend of the stock of the holding company, which theretofore had been owned by American Express, to American Express shareholders, after which the substantially dismantled Shearson, with its holding company parent, became a new, independent company and traded publicly as such,

independent of the American Express conglomerate of which Shearson had been a part when the Contract was made.

42. Following those transactions, among other things, the new entity no longer had the support and assurance of solvency described above by reason of the American Express conglomerate standing behind it and in the way of any potential insolvency.

43. As part of the same series of transactions, what had been Shearson ceased to exist even in name, further demonstrating the lack of identity between the entity that had been Shearson at the making of the Contract and the entity succeeding to Shearson or certain assets and functions of Shearson in various respects. What had become of Shearson was renamed "Lehman Brothers Inc." (the same name used by the Debtor in this case).

44. Still, after this change in name, other changes in this new entity continued.

45. By way of example, other firms were merged into this new entity over the years and other material changes occurred.

46. Under New York law, this Debtor is arguably not even a successor to Shearson, much less is it Shearson itself, and it is, in all events, not the party to which the Contract refers in using the term "Shearson."

47. Accordingly, under New York law, and as described further below, the provisions of the Contract which refer to possible subordination in the event of the insolvency of Shearson itself (or any other Shearson event) do not apply to or include a "successor" of Shearson, do not apply today, do not apply to or include this Debtor, and, indeed, were

vitiated long ago, when the "Shearson" entity changed materially from the entity that had entered into the Contract with each member of the Client Group.

*The Language of the Parties' Contract Makes Clear
that Only the Shearson Entity, as then Understood and Constituted,
Could Have Invoked the Contract's Subordination Provisions*

48. Not only the background and history of the subordination provision, but also the very carefully worded drafting of that provision and of the Contract as a whole — including the description and definition of Shearson, the numerous other provisions in which the identity of Shearson for purposes of this Contract in general and of the subordination provision in particular is made clear and the subordination provision itself — all demonstrate that this Debtor's insolvency does not trigger subordination of the acknowledged claims of the Client Group.

49. To begin, as to the definition and description of Shearson itself in the Contract, Shearson is described and defined to be Shearson as that entity was then understood and constituted, and not Shearson and its "successors" (a different formulation that, as described further below, is used expressly elsewhere in the Contract where subordination in the event of a bankruptcy is not implicated). Specifically, Shearson is described and defined in the Contract's opening paragraph as a party to the Contract as follows:

"Shearson Lehman Brothers Inc., (Shearson) for itself and as agent for certain of its subsidiaries as provided in paragraph 8, which together may be referred to hereinafter as the (Employer) and [name] (Employee) agree as follows:"

50. This definition makes clear that the entity to which the Contract refers where the term "Shearson" is used is Shearson itself, as it was then understood and constituted, and not to such possible successors.

51. Similarly, § 8 provides plainly and clearly that the parties to the Contract are only as follows, again plainly not including Shearson's "successors" in this statement where, if intended, the term "successors," which is used multiple times elsewhere in the Contract, would logically appear:

"8. Parties to Agreement.

"This agreement is between Employee and Shearson or a subsidiary or affiliate of Shearson for which Shearson is acting as agent hereunder, whichever is Employee's actual employer as of the date hereof. If Employee's actual employer changes from Shearson to a subsidiary or affiliate of Shearson or from a subsidiary or affiliate of Shearson to Shearson or another subsidiary or affiliate of Shearson, thereafter Employee's employer for purposes of this agreement shall be the new employer."

This language names as parties Shearson and, to the extent applicable, certain Shearson affiliates existing at that time, which employed Client Group members for which Shearson was then acting as an agent "as of the date [t]hereof," but plainly omits mention of "successors."

52. Throughout the Contract's provisions addressing possible subordination, the Contract refers only to Shearson, as it was then understood and constituted, as the entity whose insolvency or other events would trigger subordination in the event of a bankruptcy, and not to any possible successor of Shearson, except in certain particular contexts described further below and inapplicable here.

53. Specifically in this regard, the Contract states, at § 5(d) (on page 5):
"The payments to be made by Shearson to Employee hereunder are unsecured subordinated obligations of Employer only, and Employee is only a general subordinated creditor of Shearson in that respect." (As noted above, the Contract defines the term "Employer" in its

opening paragraph as referring to Shearson and certain of its subsidiaries but makes no mention of "successors.")

54. Similarly, the Contract states at § 9(d) (on pages 13-14), which is the provision on which the Trustee, in seeking subordination, directly relies and quotes from (at Paragraphs 7-8, misleadingly substituting "[LBI]" for the Contract's actual references to "Shearson"):

"Employee irrevocably agrees that the Obligations of Shearson hereunder with respect to the payment of amounts credited to his deferred compensation account are and shall be subordinate in right of payment and subject to the prior payment or provision for payment in full of all claims of all other present and future creditors of Shearson whose claims are not similarly subordinated (claims under this agreement shall rank pari passu with claims similarly subordinated) and to claims which are now or hereafter expressly stated in the instruments creating such claims to be senior in right of payment to claims arising under this agreement, arising out of any matter or event occurring prior to the payment date of the amounts credited to Employee's deferred compensation account under this agreement. In the event of the appointment of a receiver or trustee of Shearson or in the event of its insolvency, liquidation pursuant to the Securities Investor Protection Act of 1970 ('SIPA') or otherwise, its bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, or any other marshalling of the assets and liabilities of Shearson, the Employee shall not be entitled to participate or share, ratably or otherwise, in the distribution of the assets of Shearson until all claims of all other present and future creditors of Shearson, whose claims are senior to claims arising under this agreement, have been fully satisfied or provision has been made therefor."

55. The Contract further discusses at length, at § 9(e) (on pages 14-16), subordination of indebtedness to Client Group members to other debt, including Senior Subordinated Debt of Shearson, but again, despite advisedly and precisely using the term "successors" elsewhere, as described further below, including in other contexts within the same § 9, this discussion refers only to such debt of "Shearson" (or, in one specific instance

on page 16, to debt of Shearson subsidiaries, further demonstrating the specification of "entity" in these examples is purposeful rather than casual or inadvertent), and not to that of Shearson's successors.

56. These statements as to subordination omit mention of Shearson "successors" precisely where such mention would appear if subordination were intended as to successors. Indeed, they omit "successors" despite the specific references to successors in the immediately preceding §§ 9(b) and (c), as described further below.

57. In fact, significantly, by contrast to the definition of "Shearson" and the references to "Shearson" for purposes of subordination, the Contract, in multiple other instances, *does* indicate that certain specific provisions are applicable not only to Shearson, *but also to Shearson's "successors and assigns."* In other words, Shearson, as the drafter of the agreement, made certain provisions applicable not only to Shearson, but also to Shearson's "successors and assigns" in particular instances where such application to successors was actually intended by the parties.

58. An example of such use appears at, for example, § 11 (on page 18; this page is apparently missing from the Trustee's submission of this document as Exhibit A to Docket No. 8576-1), where the Contract provides that it:

"shall be binding upon Employee and Employee's heirs, legal representatives, and upon Shearson and Shearson's successors and assigns. Employee's rights hereunder, including rights to receive payments, are not assignable."

59. Thus, notably, this Debtor, while not an entity whose insolvency or status can trigger subordination, can and does succeed to the *obligations* of Shearson to the members of the Client Group, because Shearson's successors are bound by its provisions.

60. However, as the Contract is plainly and carefully written to provide, the Contract contains no corresponding provision that the Employee, as that term is defined (here, the Client Group members), is bound to a subordination provision keyed to a very differently constituted entity it did not know, contract with or have reason to conceive of at the time of the making of the Contract.

61. As noted above, similarly, and tellingly, in *other, unrelated portions* of § 9, within which the subordination clause the Trustee would rely upon appears (at § 9(d)), the Contract expressly includes Shearson's "successors" in contexts that govern possible repayment to Shearson but *not subordination*. In particular, the Contract sets forth, at § 9(b) (page 10) and § 9(c) (page 11), certain payment clawback provisions that might require a repayment to Shearson under the Contract, and provides further, specifically, that not only Shearson, but also Shearson's "successors or assigns," would be entitled to such repayment.

62. Indeed, that the term "successors" is intentionally and advisedly used or, as the case may be, omitted by Shearson as the drafter of the Contract is further clarified by the fact that although it is used in certain of these repayment/clawback provisions within § 9, it is *not* used in another clawback provision within § 9 (at § 9(e)(iii) on page 15) — in addressing the ranking of the debt under the Contract with other debt (in particular, Senior Subordinated Debt, of Shearson):

"Employee shall promptly return to Shearson, any amounts (whether cash, securities or otherwise) received from Shearson if the payment by Shearson of such amounts constituted a violation of the express terms of any Senior Subordinated Debt (or any agreement under or pursuant to which the same may be outstanding)."

63. Thus, again, the definition of Shearson as alleged above and the selective use of, and failure to use, the term "successors," make clear that the entity to which

the Contract refers where the term "Shearson" is used is Shearson itself, as it was then understood and constituted, and not such possible successors.

64. Plainly, Shearson, as the Contract's drafter, was able to use the term "successors" of Shearson in instances where the Contract was intended to refer to Shearson's successors. Conversely, Shearson plainly and advisedly did not use the term "successors" where the Contract was not intended to refer to Shearson's successors.

65. In this regard, the contract interpretation principles of *contra proferentem* and, relatedly, *expressio unius est exclusio alterius*, further make clear that the Contract, in referring to Shearson, refers to Shearson as it was then understood and constituted, and not to Shearson's successors, both in general and in particular as to subordination provisions and the entity whose insolvency or other events would trigger subordination.

66. Additionally, Shearson was party to other deferred compensation agreements and plans made at or near the same time as the Contract and the deferred compensation plan to which it relates, including in some instances with some of the members of the Client Group, some of which have been the subject of litigation in this Court, and in those other contracts, Shearson clearly and advisedly had defined itself differently — in those other instances, where it was intended, defining the contracting party to be not only Shearson itself, but also to include in all respects under such contracts "successors" of Shearson — including in particular as to subordination provisions and the entity whose insolvency or other events would trigger subordination.

67. Relatedly, Shearson or its predecessors were party to other deferred compensation agreements and plans in which the contracting party was defined to include its "successors" but in which there was no subordination provision whatsoever.

68. Thus, by contrast with other provisions in this and other similar Shearson agreements where the Contract refers to Shearson and its "successors," Shearson's successors are not included in the relevant provisions that could trigger subordination of the claims of the Client Group members to general unsecured claims in this case involving this Debtor.

69. All of these facts and features of the Contract and Shearson's own conduct establish that in Shearson's identification of itself as the contracting party, the insolvency of or other events concerning which could lead to subordination, Shearson intended to make clear that the mutual intent of the parties in this Contract, and the intent of Shearson in drafting this Contract, was precisely to ensure that invocation of the subordination provision could occur only as measured by Shearson as it then existed, was understood and constituted — whose capital requirements were being supported by the subordination provision, and whose insolvency was exceedingly remote by reason of its being an American Express subsidiary, as it was then understood and constituted — and not by the insolvency or other events relating to any other entity that emerged from Shearson or succeeded to Shearson's obligations under the Contract.

70. Significantly, the Contract was never amended to change this identification of Shearson as the entity whose insolvency or other events would trigger subordination.

71. The Contract could not be amended unilaterally by Shearson or by its successors.

72. In fact, there were no amendments to the Contract applicable to the members of the Client Group.

73. Were there to have been any such amendment, for it to be applicable to any member of the Client Group, each individual member of the Client Group would have had to, as to himself or herself, have executed a bilateral amendment, and no member of the Client Group did so.

74. Moreover, Shearson and any of its successors or would-be-successors were well aware of this, and if they sought to obtain such amendments, they understood how to do so.

75. Had it been the parties' intent to have the Client Group members subject to subordination in connection with insolvency or other events concerning later-arising entities such as this Debtor, these parties knew how to write such language to implement such intent, as demonstrated by their use of such language in other parts of this Contract, as well as in other Contracts between Shearson and some of the Client Group members.

76. They did not use that language in this Contract, and they did not do so for sound reasons as alleged above — they did not do so deliberately, to implement an intent that, as per this Contract, subordination would not occur in such far-reaching and unanticipated circumstances.

77. For all these reasons, the provisions the Trustee seeks to invoke here do not apply with regard to the insolvency of this Debtor.

78. For these reasons, among all others, the Trustee's effort to seek subordination of the acknowledged claims of the members of the Client Group to the claims of other general unsecured creditors fails.

AS AND FOR A THIRD DEFENSE

79. The Debtor materially breached the Contract in failing to maintain the required plan administrative body to discharge certain rights and duties under the Contract as the Contract required.

80. Specifically, the Contract provided that such an Administrative Committee of Shearson be in place to perform various functions, including:

"4. Termination.

"The Administrative Committee of Shearson has the right (if the Administrative Committee also terminates those similar agreements with its other Employees which become effective on or about the effective date of this agreement) to terminate this agreement, and Shearson's and Employee's obligations hereunder, at any time by giving Employee, or Employee's designated beneficiary or beneficiaries if Employee is deceased, written notice to that effect."

A footnote at Page 4 of the Contract further defines and describes the "Administrative Committee" as being the "Administrative Committee of the Board of Directors of Shearson."

81. Upon the changes made to and in Shearson since the time the Contract was made, there was not and could not be any such Administrative Committee as required by the Contract.

82. Additionally and relatedly, there was not any amendment to the Contract permitting a substitute administrative body.

83. The Administrative Committee, as described in the Contract, could only be the body specifically described and was no longer available or existing as described in the Contract long before the filing of this insolvency proceeding.

84. Further, and separately and independently, neither Shearson nor any successor or other entity having the obligations to the Client Group members under the

Contract, including the Debtor, whether permissibly or impermissibly, had in place for many years prior to the commencement of this insolvency case any plan administration body of the type required by the Contract (without regard to whether such a body, if constituted, would have been a proper body with authority to act under the Contract).

85. By reason of the foregoing, the Client Group members were deprived of a critical, material right in the Contract — *viz.*, the existence of a body properly constituted with authority to terminate the underlying deferred compensation plan in anticipation of possible insolvency, to terminate the plan for other reasons, both in the interests of Shearson and/or the individual participants in the deferred compensation plan, and to carry out other duties articulated throughout the Contract as belonging to the Administrative Committee.

86. Indeed, the Administrative Committee's right and duty to terminate the deferred compensation plan in the face of a potential insolvency and thereby cause return of the Client Group members' funds before such insolvency was an intended and critical component of the plan, which was openly discussed with potential participants before they entered into the Contract.

87. The Debtor's and its predecessors' failure to have in place the required plan administration body as required by the Contract was and is a material breach of the Contract, occurring prior to the filing of this bankruptcy proceeding.

88. As a consequence, by reason of that material breach of the Contract, the Debtor is precluded, under New York law, from relying upon contractual provisions, such as the subordination provisions, in its favor.

AS AND FOR A FOURTH DEFENSE

89. The Debtor materially breached the Contract in taking impermissible tax deductions and/or claiming other impermissible tax benefits in connection with the Contracts and the related deferred compensation plan in the hundreds of millions and possibly billions of dollars..

90. This conduct resulted in extensive and ongoing audits on those issues by the Internal Revenue Service and possible other governmental authorities.

91. The Debtor's and its predecessors' abuse of the tax entitlements in connection with the Contract was a material breach of the Contract, occurring prior to the filing of this bankruptcy proceeding.

92. In particular, this conduct imperiled the viability of the deferred compensation plan to which the Contracts and the entitlements thereunder of the members of the Client Group relate, such that it brought about the meaningful likelihood that the Client Group would have been deprived of benefits under the Contracts by direct result of such conduct and its consequences with the Internal Revenue Service.

93. As a consequence, by reason of that material breach of the Contract, the Debtor is precluded, under New York law, from relying upon contractual provisions, such as the subordination provisions, in its favor.

AFFIRMATIVE DEFENSES

For its statement of Affirmative Defense, the Client Group alleges:

**AS AND FOR A
FIRST AFFIRMATIVE DEFENSE**

94. This proceeding seeking to subordinate the claims of the Client Group to claims of general unsecured creditors is not brought in accordance with applicable Bankruptcy Law and rules and, accordingly, cannot result in a valid order resulting in such subordination.

**AS AND FOR A
SECOND AFFIRMATIVE DEFENSE**

95. The pleadings and/or papers on which the Trustee relies to seek subordination in this case do not state a claim for relief pursuant to which the requested relief may be granted because they misdescribe the entities to which these pleadings and papers, and the underlying agreements, refer, and a correct description would require that the claim for relief or subordination be dismissed, with prejudice, in accordance with F.R.C.P. 12(b)(6) and F.R.B.P. 7012(b).

**AS AND FOR A
THIRD AFFIRMATIVE DEFENSE**

96. The pleadings and/or papers on which the Trustee relies to seek subordination in this case do not state a claim for relief pursuant to which the requested relief may be granted because they misdescribe the documents to which these pleadings and papers refer, and upon which they rely, and the correct and actual papers, if attached or accurately described, would require that the claims for relief or subordination be dismissed, with prejudice, in accordance with F.R.C.P. 12(b)(6) and F.R.B.P. 7012(b).

AS AND FOR A
FOURTH AFFIRMATIVE DEFENSE

97. The pleadings and/or papers on which the Trustee relies to seek subordination in this case do not, taken as a whole, state a claim for relief or subordination pursuant to which the requested relief may be granted and must be dismissed, with prejudice, in accordance with F.R.C.P. 12(B)(6) and F.R.B.P. 7012(b).

AS AND FOR A
FIFTH AFFIRMATIVE DEFENSE

98. The Trustee's efforts to seek subordination in this case are barred, because of the facts and matters alleged above which are incorporated herein by reference, by the doctrine of waiver.

AS AND FOR A
SIXTH AFFIRMATIVE DEFENSE

99. The Trustee's efforts to seek subordination in this case are barred, because of the facts and matters alleged above, which are incorporated here by reference, by the doctrine of estoppel.

AS AND FOR A
SEVENTH AFFIRMATIVE DEFENSE

100. The Trustee has failed to allege that this is a core proceeding.

AS AND FOR AN
EIGHTH AFFIRMATIVE DEFENSE

101. This is a non-core proceeding, and the Client Group members do not consent to entry of final orders or judgments by the Bankruptcy Court.

AS AND FOR A
NINTH AFFIRMATIVE DEFENSE

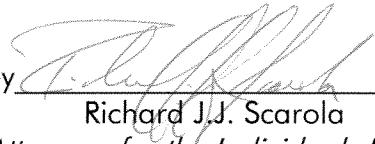
102. The Trustee's effort to seek subordination in this case are subject to a requirement by the parties' Contract that the issue presented be resolved by mandatory arbitration:

"5. (i) This agreement and all other similar agreements which become effective shall be interpreted and construed by the Administrative Committee and the determination of the Administrative Committee as to any disputed question shall be conclusive, except that any controversy arising out of or relating to the subordination provisions of paragraph 9, shall be, submitted to and settled by arbitration pursuant to the Constitution and Rules of the New York Stock Exchange ('Exchange'). Shearson and Employee shall be conclusively bound by such arbitration."

Accordingly, the issues raised and presented herein by the Trustee must be arbitrated in accordance with the Contract.

Dated: New York, New York
April 29, 2014

SCAROLA MALONE & ZUBATOV LLP

By 
Richard J.J. Scarola
*Attorneys for the Individuals Identified
in the Notice of Appearance
at Docket No. 8234 (Appendix A)*
1700 Broadway
41st Floor
New York, NY 10019
Tel.: (212) 757-0007

APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

LEHMAN BROTHERS INC.,

Debtor.

Case No. 08-01420 (SCC) SIPA

NOTICE OF APPEARANCE AND
REQUEST FOR SERVICE OF PAPERS

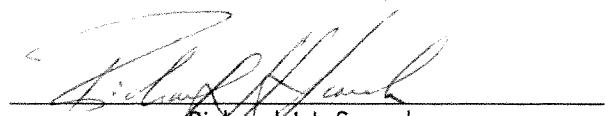
Pursuant to Fed. R. Bankr. P. 2002, 9007 and 9010(b), the undersigned attorneys respectfully request the Clerk of the Court to enter their appearance in this case on behalf of the creditors listed in Exhibit A hereto for the limited purpose of opposing the efforts of the Trustee to subordinate their certain claims, also listed in Exhibit A, to the claims of general unsecured creditors (the "Issue of Subordination"), and requests all parties in interest to serve copies of all papers served or filed in this case with respect to this issue upon the undersigned, at the office address and telephone number set forth below.

By filing this Notice of Appearance, it is noted in particular but without limitation that the undersigned counsel and their clients (a) do not waive any rights to object to the jurisdiction of this Court with regard to the Issue of Subordination, (b) do not agree or consent to the jurisdiction of this Court to render a final order or other relief pursuant to the doctrine of *Stern v. Marshall* with regard to the Issue of Subordination, and (c) do not agree or consent, and object, to the filing by the Trustee of the various motions (Dkt. Nos. 6847, 6865, 6866, 7264, 7388 & 8196) directed at the clients listed on Exhibit A to subordinate their claims as a contested matter rather than as an adversary proceeding in violation of Fed. R. Bankr. P. 3007 and 7001(8), and object to the Court rendering any relief in connection with such motions other than dismissal with prejudice (and expressly reserve the right to seek

such dismissal with prejudice), and (d) do not agree or consent to the conversion of the contested matters described above into adversary proceedings or granting any other relief with respect to such motions other than dismissal with prejudice.

In entering this Appearance, it is noted that the Trustee's counsel has reviewed this list of claimants and claim numbers on Exhibit A and identified a limited number of instances as to which they believe duplicative, amended or superseded claims may have been filed or noted other clerical errors. Counsel now appearing will work with the Trustee's counsel on those issues and will make any amendments to this list as to names or claim numbers as are warranted by further developments or information.

Dated: New York, New York
February 13, 2014


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EXHIBIT A

Last Name	First Name	Claim # **Unless otherwise noted, each claim number listed is preceded by "700"	Notes
Ackerman	Donald	1433 & 1872	
Ades	Sabah	1785	
Allesandro	Robert	1435 & 1874	
Ambrecht	Kennth	1436 & 1875	
Anderson	Brenton	1438 & 1877	
Anderson	Jeffrey	1439 & 1878	
Angst	Chuck	1786	
Ashe	Kathleen	1440 & 1879	
Asher	Thomas	1441 & 1880	
Atchison	John	1442 & 1898	
Ayoub	Anthony	1443 & 1899	
Baker	John Jr.	1444 & 1905	
Barrett	Bernard	1712	
Bary	Roberta	1714	
Batkin	Alan	1445 & 1907	
Beckerman	Stanley	1447 & 1909	
Bellas	Albert	2001	
Bellinger	Richard	1448 & 1910	
Bender	Douglas	1449 & 1912	
Bender	Theodore III	2053	
Berkley	Henry	2054	
Besse	Robert	1450 & 1913	
Best	Alan	1451 & 1914	
Biggar	Elizabeth	1455 & 1918	
Blum	Kevin	1452 & 1915	
Blutinger	Natan	1834	
Boe	Richard	2002	
Bohn	Francois	1453 & 1916	
Borchers	Leon	1454 & 1917	
Bourne	George	1823	
Boyd	William Jr.	1457 & 1920	
Boyles	Kenneth	1459 & 1922	
Brady	Jane Wilde	1460 & 1923	
Brager	Stanley	2004	
Brandt	Coleman	1716	
Breck	Chris	1717	
Breck	William Jr.	1719 & 2543	
Bresnan	John	2555	
Broadbent	William	1462 & 1949	
Broda	Kathleen	1721	
Brown	Melville	1468 & 1954	
Brown	Robert Mott III	2055	
Brydson	John	1464 & 1950	

Buls	Arthur	2056	
Burns	Thomas	1835	
Burns	Perry	1465 & 1951	
Burton	Mark	1466 & 1952	
Bussaca	Gary	1824	
Butters	David	1836; 1837	
Buttery	Stuart	1467 & 1953 & 2033	
Cagnina	Robert	1469 & 1955	
Campbell	Robert	1471 & 1957	
Capra	James	2057	
Carbone	Rudolph	1472 & 1958	
Carbone	James	1787	
Carns	Lewis	1473 & 1959	
Caruana	Sal	1722	
Ceisler	Robert	1724	
Cerasia	Robert	1474 & 1960	
Chatley	Bruce	1475 & 1961	
Chen	Phil	1477 & 1963	
Childers	John	1478 & 1964	
Ciemniecki	Stanley	1479 & 1965	
Clark	James	1788	
Coghlan	John	1924	
Cohen	Paul	1480 & 1966	
Cohen	Leonard	2005	
Cohen	Sallee	2007	
Colacurci	Glenn	1481 & 1967	
Cole	Emried D III	1925; 1939; 7000877	POC #7000877 does not have "700" prefix
Conway	Michael	1838	
Cooper	Stanley	2072	
Cosgrove	Thomas	1483 & 1969	
Couch	William	1489	
Cox	Timothy	1490	
Cronin	William	1491	
Cunningham	Kevin	4584	No 700 prefix to claim number
Dapuzzo	Peter	2008; 2009	
Darsky	Judith	2010	
Dauman	Stewart	1493	
De Gaglia	Tom	1839	
Degennero	Mark	1840	
Delaney	Steven G.	4495	No 700 prefix to claim number
DelCampo	Michael	1841	
Delli Paoli	Robert	1495	
Deutsch	Harvey	1725	
Dixon	Barbara	1496	
Dobin	Michael	1497	

Doeple	William	1498 & 1631	
Dolan	Robert Jr.	1842	
Dorfman	Richard	2011	
Doris	Martin	1499	
Drescher	Dennis	1501	
Dworsky	David	2122; 2124	
Edmiston	Robert	1843	
Edwards	William	1505	
Edwards	Michael	1503	
Edwards	Paul	1504	
Elliott	Frederic S.	2125; 2126	
Eschert	Erwin	1507	
Estey	Arthur	1928	
Evelo	Joseph	2127	
Evenson	Don	1508	
Farley	James	1509	
Feldman	Helga	8003716	No 700 prefix to claim number
Feldman	Richard	1511	
Feldman	Alan	1825	
Fenwick	Larry	1512	
Finlayson	Roderick	1513	
Fish	Jason	1514	
Fishbein	Norman	1516	
Forshagen	Doug	1515	
Frank	Fred	2073	
Frank	Edwin III	1726	
Frankel	Arnold	1519	
Friedman	Mark	2012	
Fry	Edward Jr.	1520	
Fulton	Thomas	1814 & 1942; 626; 9000750	POC #626 and #9000750 do not have "700" prefix
Fultz	Thomas	1521	
Gallatin	Ron	1727	
Gallea	Anthony	1869	
Galleher	Richard	1522	
Ganz	Susan	1523	
Garber	Alan	1524	
Gard	Ronald	1525	
Gartland	Jude	1526	
Garzarelli	Elaine	1527	
Gengler	Thomas Jr.	1845	
Genirs	Robert	1421 & 1972	
Gioiella	Henry	1529	
Gladstone	Alan	1530; 2071	
Glasky	Joel	1531	
Goode	John	1534	

Goodspeed	Roger	1729	
Gott	Stephen	1539	
Gottmann	Hank	1827	
Graber	Jerrold	1540	
Graves	John	1541	
Gregory	Robert	1542	
Guernsey	Alan	1846	
Hadley	Edwin III	2074	
Hament	Nancy	1424 & 1974	
Hart	Edward	1545 & 2029	
Hayes	Brian	1731	
Hayes	Dennis Lee	1847	
Herman	Harvey	4380	No 700 prefix to claim number
Hermann	John A. Jr.	2533	
Hershberg	David	1425 & 1975	
Herzer	Charles	1732	
Hetzl	Charles	1547	
Higgins	Harrison	1549	
Hill	Tomlinson	1733	
Hoffman	Arnold	1551	
Hoffman	Kenneth	1552	
Hoopes	Scott	1553	
Hubbard	Charles	2058	
Illiges	John	2128	
Isles	Philip	1555	
Jackson	Michael	2075 & 2129	
Jacobs	David	1557	
James	Graeme	1558	
Kaplan	Jack	2164; 3367	POC #3367 does not have "700" prefix
Kaplan	Alice	1564; 6035	POC #6035 does not have "700" prefix
Karol	Herbert	2238	
Katz	Evan	1565	
Kaufman	Joel	1566	
Kearns	William Jr.	1567	
Kelly	Brian	1790	
Kilgore	Jonathan	1569	
Kirby	William	1570	
Klonsky	Daniel	1571	
Kobak	Martin	1	No 700 prefix to claim number
Kopp	Bradford	1848	
Kowski	George	1572	
Kozeletz	Stephen	1849	
Kra	Howard	1573	
Krantz	Eric	1574	

Krueger	Harvey	2059	
Kunigk	Peter	1575	
Lakefield	Bruce	1577	
Lancaster	Robert	1579	
Landau	Arnold	1580	
Landgraf	Karl	1581	
Lane	Jeffrey	1582	
Leetzow	Leonard, Jr.	1583	
Lehman	Jack	1585	
Lehr	Seth	1586	
Lenz	William	1588	
			POC #6131 has no "700" prefix to claim number
Lessing	Stephen	2252; 6131	
Levinson	Andrew	1590	
Levy	John	1591	
Lewis	Dorothy	2060; 2061	
Libman	Spencer	1593	
Lind	Robert	1594	
Lindstrom	Ward	1735	
Lloyd	Marcelle	2013	
Lord	William	1737	
Lovett	Nigel	1596 & 1632	
Lusardi	Robert	1597	
Madden	Michael	1598	
Maguire	James	1599	
Manley	James	2147	
Marantz	Alan	1600	
Marino	Thomas	1602	
Marks	Herb	1603 & 1630	
Martinez	Roman	1604	
Martov	Martin	1605	
Matza	Robert	1606	
			POC #654 and #3572 do not have "700" prefix
May	Harold H.	2014; 2166; 654; 3572	
McCann	John	1611; 4705	POC #4705 does not have "700" prefix
McCleary	John	1607	
McCormick	Robert	1852	
McDaniel	Roger	1608	
McDonald	Patrick	245	No 700 prefix to claim number
McDougall	John	4412	No 700 prefix to claim number
McGlynn	Edward	2018	
McGuinn	Edwin III	1419 & 1976	
McHale	Edward	1609	

McKeown	William	1612	
McLendon	Heath	1738	
Mehaffrey	Stan	1614 & 1633	
Mejean	Paul	1615	
Melnik	Ronald	1616	
Melzer	Richard	1617	
Messinger	Craig	1618	
Mickel	Frank	1739	
Mikulich	Raymond	1619	
Millard	Robert	1741	
Miller	Ronald	1931	
Miller	Jerome	1620	
Milverstad	Michael	1634	
Minter	Alan	2062	
Montalbano	Richard	1635	
Morgia	Cataldo	1636	
Mortkowitz	Harry	1637	
Moschella	Joseph	1644	
Munro	William	1638 & 2168	
Murphy	Newell III	1740	
Murray	Philip	1640 & 2030	
Nastro	Charles	1642	
Navrude	Stanley	1853	
Neill	Frank Jr.	1643	
Nestor	Thomas	1932	
Newmark	Paul	1645	
Odermatt	Robert	1647	
Orlins	Stephen	1648	
Owens	John	1650	
Palatnek	Arnold	1649	
Passman	Seymour	2020	
Penrose	James	1651	
Pettit	MaryAnne	2149; 2148	
Phyfer	Daniel	2022	
Plumeri	Joseph	1652	
Poggi	Anthony	90001540; 1357; 2945	These claims do not have a "700" prefix.
Poggi	Irene	1792	
Polhemus	Kenneth	1653	
Pollack	Howard	1654	
Pondt	David R.	655; 1655	POC #655 does not have "700" prefix
Porter	Grant	1656 & 1710	
Pravato	Frank	1742	
Pucciarelli	Jim	1657	

Pulling	Thomas	1743; 2058; 2057; 9003379; 9003380	POC #2058, #2057, #90033379 and #9003380 do not have "700" prefix
Quast	Lani	1658 & 1702	
Raney	Richard	1659	
Reef	Alan	1854	
Reitzel	Edward	1660 & 1664	
Renehan	Dan	1661	
Renzi	Louis	1662	
Ring	Carl Jr.	1665	
Ritz	Norman	1666	
Robson	Thomas	1668	
Roosevelt	Theodore IV	1426 & 1977	
Roper	James	1933	
Rosenberg	Nanette	1670	
Sacco	Gregory	1671	
Samra	Victor, Jr.	1856	
Savarese	Lawrence Jr.	1673	
Scanlon	Joseph Jr.	1744	
Scaraggi	Frank	1857	
Schaefer	Gary	1858	
Schiffer	Craig	1420 & 1979	
Schoenthal	David	1934	
Schulsinger	Jeffrey	1674	
Seibels	Robert III	2066	
Shafiroff	Martin	1676	
Shaftel	Mel	1678	
Shapiro	Robert	1679	
Shean	Anne	1680	
Sheinberg	George	1793	
Shelton	Charles	1681; 2187	POC #2187 does not have "700" prefix
Shepard	Frank	1682	
Sherman	John	1746	
Shorr	David	2068	
Shutzer	William	1684	
Silverberg	David	1685	
Simmons	Hardwick	1686	
Simonetti	Philip	1687	
Simonini	Julius	1688	
Sinai	Allen	2023	
Slifer	Stephen	1689	
Sobotka	David	1690	
Spar	Warren	1691	
Spiegel	Steven	1859	
Stern	James	1749; 1750	

			No 700 prefix to claim number
Stipo	Michael J.	4688	
Stone	Jerry	1693	
Strong	Roger	2136	
Struble	Raymond	1695	
Terrell	Steven	1822	
Tilles	Glenn	1861	
Tobin	Paul	1697	
Topol	Clifford	1863	
Troy	Austin	1699	
Tucker	Thomas	1700	
Urciuoli	Carmine	1751	
VandenBossche	Pamela	1935	
Viering	Donald	1864	
Vincent	Richard	1752	
Virany	Steven	1753	
Vlach	Roger	2069	
Voelker	Edward	1754	
Wait	Jarett	1756	
Walther	Gary	1758	
Washkowitz	Alan	1759; 1760	
Weinberg	Richard	2137	
Weiss	Eugene	2152	
West	Pat	1761	
Weston	Gerald	1762	
Williams	Paul	1763	
Williamson	John Jr.	1937	
Wilson	John	1764	
Winchester	David	1938	
Wolff	William III	1865	
Wolitzer	Steven	1765	
Wright	John	1867; 1868	
Wright	Jeannie	1766; 1811	
Wynn	Barry	1768	
Yarkin	Allan	1769	
Zatulove	Paul	1770	
Zipp	Brian	1771	
Zook	George	1772	